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Implications of the *Small v. United States* Decision

Anwar K. Malik¹

IN the United States in 2004, over 449,000 victims of violent crimes reported they were at the mercy of an assailant armed with a firearm, and an estimated two-thirds of the 16,137 murders committed involved firearms.² The number of reported murders in Kentucky in 2004 rose from 181 to 216 over the course of a single year, a staggering 19.3% increase.³ Reported robberies similarly increased by 4.6%, and 46% of the Kentucky robberies were committed with the aid of firearms.⁴ Although there are twenty-two major federal gun crimes, 87% of all federal gun prosecutions involved either of two crimes: use of a firearm to commit a violent or drug crime or possession of a firearm by a convicted felon.⁵

Congress enacted the Gun Control Act of 1968 ("GCA")⁶ with the broad purpose of keeping guns out of the hands of individuals who have shown that "they may not be trusted to possess a firearm without becoming a threat to society."⁷ Based on their potential danger to the public, certain categories of individuals are prohibited, by federal law, from owning firearms. Criminal convictions for serious crimes such as murder and rape arguably provide a reliable basis for gauging the likelihood of committing future crimes.⁸ The GCA, in what is commonly known as the felon-in-pos-

1 J.D. expected 2007, University of Kentucky College of Law.

2 BUREAU OF JUSTICE, FIREARMS AND CRIME STATISTICS, <http://www.ojp.usdoj.gov/bjs/guns.htm>.

3 KENTUCKY STATE POLICE, 2004 CRIME IN KENTUCKY 4, available at <http://www.kentuckystatepolice.org/pdf/crimefacts2004.pdf>.

4 *Id.* at 4, 10.

5 AMERICANS FOR GUN SAFETY FOUND., THE ENFORCEMENT GAP: FEDERAL STRATEGY NEGLECTS SOURCES OF CRIME GUNS 2 (2004), available at <http://w3.agsfoundation.com> (follow "AGSF Reports" hyperlink; then follow "The Enforcement Gap" hyperlink; then follow "Download in .pdf format" hyperlink).

6 18 U.S.C. § 922 (2000).

7 *Lewis v. United States*, 445 U.S. 55, 63 (1980) (quoting *Scarborough v. United States*, 431 U.S. 563, 572 (1977)).

8 Studies suggest that a small number of criminals commit most serious crimes. See generally William Claiborne, "Three Strikes": Tough on Courts Too; California's Sentencing Law Leads to Criminal Justice Logjam, WASH. POST, Mar. 7, 1995, at A1 (Former California Secretary of State Jones, sponsor of the "Three Strikes" law, estimates that seven percent of criminals commit nearly two-thirds of serious crimes); Timothy Egan, *A 3-Strike Law Shows It's Not as*

session statute, makes it a crime for felons and other individuals to own guns.⁹ Title 18 U.S.C. § 922(g)(1) provides that it is unlawful for a person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year” to possess a firearm.¹⁰

A criminal arguably poses a “threat to society” regardless of where he committed murder, rape, or some other serious crime. Most felonies under federal or state law are also serious crimes in other nations. Over thirty-three million foreign-born individuals live in the United States.¹¹ People continue to travel abroad in great numbers despite concerns over terrorism. In 2004, international visitors to the United States totaled over forty-six million, and there were over sixty-one million outbound U.S. residents.¹²

This Note focuses on whether immigrants, visitors to the United States, and returning U.S. residents, whose criminal convictions occurred beyond the territorial boundaries of the United States, ought to fall within the scope of the GCA. In supporting the position of a majority of the circuit courts and the dissenters in a recent Supreme Court case, *Small v. United States*, Part I relies on the plain meaning of § 922(g)(1), statutory purpose, legislative history, canons of construction, and pragmatism to argue that foreign convictions should count. Part II discusses issues that may arise from the proposed new rule and holding of the *Small* case. Of particular importance is the decision’s potential effect on other statutes enacted with similar expansive language including certain provisions of the Patriot Act and the Immigration and Nationality Act. Finally, Part III proposes solutions to the problem of using foreign convictions as the basis for domestic prosecution. Those who feel they were wrongly convicted in a foreign court can request relief from the Secretary of the Treasury so they may lawfully possess a gun in the United States. The Restatement (Third) of Foreign Relations Law of the United States provides for judicial non-recognition of foreign judgments.¹³ Adoption of the Restatement approach would provide additional protection for the interests of defendants claiming they were wrongfully convicted in a foreign court.

Simple as It Seems, N.Y. TIMES, Feb. 15, 1994, at A1 (Federal statistics show that “6 percent of criminals commit about 70 percent of all crimes”).

9 18 U.S.C. § 922 (2000).

10 *Id.* at § 922(g)(1).

11 U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT 1 (2003), available at <http://www.census.gov/population/socdemo/foreign> (follow “pp1-174” hyperlink; then follow “tab 03-01.pdf.” hyperlink.).

12 Office of Travel & Tourism Industries, <http://tinnet.ita.doc.gov/view/f-2003-05-001/index.html>.

13 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

I. SCOPE OF THE FELON-IN-POSSESSION STATUTE DEFINED

Japanese police arrested Gary Sherwood Small (“Small”), a Pennsylvania resident, when he smuggled a water heater filled with several firearms and ammunition into Japan from the United States.¹⁴ In April 1994, a Japanese court convicted Small of violating the Japanese Act Controlling the Possession of Firearms and Swords, the Gunpowder Control Act, and the Customs Act.¹⁵ Each crime was punishable by imprisonment for a term exceeding one year.¹⁶ The Japanese court returned a five-year sentence.¹⁷ Small was subsequently released on parole in November 1996.¹⁸

Small left Japan for the United States upon termination of parole. In June 1998, Small purchased a handgun from a Pennsylvania dealer and filled out a form supplied by the Bureau of Alcohol, Tobacco, Firearms and Explosives.¹⁹ He did not disclose the Japanese conviction when asked the following question: “Have you ever been convicted in any court of a crime for which the judge could have imprisoned you for more than one year, even if the judge actually gave you a shorter sentence?”²⁰

After a background check by the government led to discovery of the Japanese conviction, police searched Small’s apartment and found another handgun and 335 rounds of ammunition.²¹ The government brought criminal charges against Small for unlawful possession of a firearm by a person who has a prior conviction pursuant to 18 U.S.C. § 922(g)(1).²²

A. Procedural History

Small was indicted on four counts: one count of making a false statement to a federally licensed firearms dealer, one count of possession of ammunition by a convicted felon, and two counts of possession of a firearm by a convicted felon.²³ Small urged dismissal of the indictment because his Japanese conviction was beyond the scope of § 922(g)(1),²⁴ but the motion

14 *Small v. United States*, 544 U.S. 385, 395 (2005) (Thomas, J., dissenting).

15 *United States v. Small*, 333 F.3d 425, 426 (3d Cir. 2003), *rev’d*, 544 U.S. 385 (2005).

16 *Id.* at 426.

17 *Small*, 544 U.S. at 387.

18 *Id.* at 395 (Thomas, J., dissenting).

19 See Brief of United States at 3, *United States v. Small*, 544 U.S. 385, No. 03-750, available at <http://www.usdoj.gov/osg/briefs/2003/oresponses/2003-0750.resp.pdf> [hereinafter Brief].

20 *Id.* at 3–4.

21 *Id.* at 4.

22 *Id.* at 4.

23 *United States v. Small*, 183 F. Supp. 2d 755, 756–757 (D. Pa. 2002), *aff’d*, 333 F.3d 425 (3d Cir. 2003), *rev’d*, 544 U.S. 385 (2005).

24 See generally *id.*

was denied.²⁵ Subsequently, Small conditionally pled guilty.²⁶ The Federal District Court concluded that the phrase "convicted in any court" included foreign convictions,²⁷ and the Court of Appeals for the Third District affirmed.²⁸ Both courts agreed that the statute encompasses foreign judgments and that the Japanese judicial proceedings were fair.²⁹ The Supreme Court granted certiorari to tackle the issue of whether "any court" includes foreign courts.

B. The Decision

The controversial *Small* decision on April 26, 2005 settled a then-existing circuit split among the lower federal courts. A majority of the circuits agreed that foreign convictions should serve as predicate offenses. The Third,³⁰ Fourth,³¹ and Sixth³² Circuits concluded that foreign convictions count for purposes of 18 U.S.C. § 922. The Second³³ and Tenth³⁴ Circuits took the contrary position. The *Small* Court, in a 5 to 3 opinion delivered by Justice Breyer, sided with the Second and Tenth Circuits and held that "convicted in any court" refers to only domestic convictions.³⁵

25 *Id.* at 770. Small did not challenge his conviction or the constitutionality of § 922(g)(1) on Second Amendment grounds. Therefore, the *Small* opinion does not mention the Second Amendment. This raises a difficult constitutional question the Court may eventually have to tackle: Can a foreign court's judgment limit a citizen's "right to keep and bear arms"? Even the ability of a domestic conviction to make a criminal's gun ownership unlawful is controversial. Pro-gun organizations oppose incremental restrictions on gun rights based on the fear that Congress, if unrestrained, may eventually strip their rights, as law-abiding citizens, to own guns. Vehement opposition to recent legislation such as the Brady Law supports such a notion.

26 *United States v. Small*, 333 F.3d 425, 426 (3d Cir. 2003).

27 *See* Brief, *supra* note 19, at 4.

28 *See Small*, 333 F.3d at 426.

29 *Id.* at 427-28.

30 In adopting the Restatement (Third) of Foreign Relations Law of the United States § 482, the Third Circuit Court of Appeals determined that foreign convictions should be recognized, but with procedural safeguards to ensure foreign convictions comply with our notions of fundamental fairness. *See Small*, 333 F.3d at 428.

31 *See United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989) (agreeing with the *Winson* court on the inapplicability of the rule of lenity because the statute is unambiguous), *overruled by Small v. United States*, 544 U.S. 385 (2005).

32 *See United States v. Winson*, 793 F.2d 754 (6th Cir. 1986) (finding the statutory language unambiguous), *overruled by Small v. United States*, 544 U.S. 385 (2005).

33 *See United States v. Gayle*, 2003 U.S. App. LEXIS 26673 (2d Cir. 2003) (relying on legislative history including the Senate Report and the Conference Report).

34 *See United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000) (invoking the rule of lenity to hold that foreign convictions do not count).

35 *Small*, 544 U.S. at 386. Former Chief Justice Rehnquist was undergoing treatment for thyroid cancer and did not participate; *see generally* Linda Greenhouse, *Justices Limit Gun Law That Bars Possession by Felons*, N.Y. TIMES, Apr. 27, 2005, at A3, 18.

C. Statutory Interpretation

The majority, in refusing a literal reading of § 922(g)(1), relied on its belief that the statutory text is ambiguous in light of congressional silence, stressed that foreign judgments are not as reliable as domestic convictions, and asserted that a literal reading would lead to anomalies.³⁶

The dissenters, led by Justice Thomas, argued for a literal reading of the statute.³⁷ Justice Thomas emphasized the plain meaning of the text, the majority's misuse of canons of construction, and legislative history, in particular an amendment to the Senate bill that eliminated limiting language in favor of expansive text.³⁸

1. Textual Analysis.—The Court began by looking to the plain meaning of the statute.³⁹ Section 922(g)(1) provides that “[i]t shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to possess in or affecting commerce any firearm or ammunition.”⁴⁰ Unless ambiguous or absurd, the plain words of a statute should be given effect.⁴¹ The majority determined that the presence of the word “any” is insufficient in itself to reach a conclusion⁴² despite the fact the Court has previously given “any” an expansive meaning.⁴³ Contrary to Justice Breyer's reasoning, the Fourth Circuit has indicated that “[a]ny” is hardly an ambiguous term, being all-inclusive in nature.”⁴⁴

On the same day *Small* was decided, the *Pasquantino* majority, in an opinion written by Justice Thomas, held that a plot to defraud a *foreign* government of tax revenues falls within the scope of a statute prohibiting the use of interstate wires for “any scheme or artifice to defraud.”⁴⁵ *Pasquantino*, like *Small*, involved aspects of international law. The *Pasquantino* defendants smuggled liquor into Canada to evade import taxes and were prosecuted under the federal wire fraud statute.⁴⁶ At issue was “whether a scheme to defraud a foreign government of tax revenue violates the wire

36 See *Small*, 544 U.S. at 386–94.

37 *Id.* at 1759–60 (Thomas, J., dissenting).

38 *Id.* at 1759–66 (Thomas, J., dissenting).

39 *Id.* at 1754.

40 18 U.S.C. § 922(g)(1)–(9).

41 See generally *Caminetti v. United States*, 242 U.S. 470, 485–86 (1917) (plain meaning rule).

42 *Small*, 544 U.S. at 388–89.

43 See *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

44 *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989).

45 *Pasquantino v. United States*, 544 U.S. 349, 354–59 (2005) (citing 18 U.S.C. § 1343) (emphasis added).

46 *Id.* at 353.

fraud statute.”⁴⁷ The defendants argued they had not committed wire fraud within the meaning of the statute because the government was effectively attempting to enforce the revenue laws of Canada.⁴⁸ Nevertheless, the Court found the defendants’ conduct to be within the scope of the act and upheld prosecution of Pasquantino for violation of foreign tax law.⁴⁹ It is difficult to reconcile the *Small* and *Pasquantino* decisions given that the Court effectively accepted an expansive interpretation of the words of the wire fraud statute but refused to give a similar reading to § 922(g)(1).

One might wonder why Congress chose “convicted in any court” instead of a phrase that more accurately represents Justice Breyer’s statutory interpretation, such as “convicted in any domestic court” or “convicted in any state or federal court.” Legislative history indicates that Congress considered alternate language. As passed by Congress, § 922(g)(1) makes no reference to “Federal” or “State” crimes.⁵⁰ Before being amended, the Senate bill specified “Federal” crimes punishable by more than one year of imprisonment and “crimes determined by the laws of a State to be a felony.”⁵¹ Justice Breyer’s argument that Congress made the changes to “avoid[] potential difficulties arising out of the fact that States may define the term ‘felony’ differently”⁵² is unconvincing because “convicted in any state or federal court” is a better choice to serve that purpose.⁵³

The majority’s argument is further weakened by the fact that Congress chose specific language in enacting other sections of the statute:

The term ‘crime punishable by imprisonment for a term exceeding one year’ does not include—(A) any *Federal* or *State* offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any *State* offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.⁵⁴

Congress presumably desires textual uniformity in the GCA. For example, readers of the GCA should be able to read the statutory definition for a term and locate this term in any two provisions knowing the two instances of such term have the same meaning unless specified otherwise.

47 *Id.* at 354.

48 *Id.* at 354–54.

49 *Id.* at 372.

50 See 18 U.S.C. § 922(g)(1) (2003) (“convicted in any court of, a crime punishable by imprisonment for a term exceeding one year”).

51 *Small*, 544 U.S. at 406 (Thomas, J., dissenting).

52 *Id.* at 393.

53 *Id.* at 406 (Thomas, J., dissenting).

54 18 U.S.C. § 921(a)(20) (emphasis added); see also 18 U.S.C. § 921(a)(33)(A)(i) (“[T]he term ‘misdemeanor crime of domestic violence’ means an offense that—(i) is a misdemeanor under Federal, State, or Tribal law”).

Yet section 922(g)(1) makes no reference to “Federal” or “State” crimes since, presumably, Congress did not intend to limit the statutory scope to domestic courts. Because the text is unambiguous and Congress chose an expansive meaning in enacting § 922(g)(1), the literal meaning should be given effect. A casual reading of the words suggests it should be unlawful for Small to possess a firearm in the United States.

2. *Canons of Construction.*—Perhaps finding inadequate support for its position in existing doctrines,⁵⁵ the majority “first invents a canon of statutory interpretation—what it terms ‘an ordinary assumption about the reach of domestically oriented statutes.’”⁵⁶ As Justice Thomas describes, “This new ‘assumption’ imposes a clear statement rule on Congress: Absent a clear statement, a statute refers to nothing outside the United States.”⁵⁷ The new rule is similar to, but broader than, the doctrine against extraterritoriality.⁵⁸

The doctrine against extraterritoriality reflects a rule of construction that restricts a statute from applying abroad unless Congress intended for it to do so.⁵⁹ A court should restrict the statute from reaching conduct occurring abroad if Congress is silent on whether the statutory scope extends beyond the territorial boundaries of the United States.⁶⁰ The doctrinal purpose is to diminish clashes between United States and foreign laws.⁶¹ However, because § 922(g)(1) does not criminalize gun possession in countries other than the United States, the facts of this case do not implicate the doctrine against extraterritoriality.⁶²

Justice Breyer recognizes the inapplicability of this doctrine and creates a new assumption.⁶³ Its application requires that a statute be “domestically oriented.” If the court determines that a statute is “domestically oriented” and the “statutory language, context, history, or purpose”⁶⁴ does not suggest otherwise, then the statute should be restricted from reaching conduct outside the United States. The “ordinary assumption about the reach of

55 *Small*, 544 U.S. at 400 (Thomas, J., dissenting). Justice Thomas also notes, “Aside from the extraterritoriality canon, which the Court properly concedes does not apply, I know of no principle of statutory construction justifying the result the Court reaches.” *Id.*

56 *Id.* at 399 (Thomas, J., dissenting) (quoting *id.* at 390 (majority opinion)).

57 *Id.* at 399 (Thomas, J., dissenting). The majority opinion denied that it created a clear statement rule. *Id.* at 390.

58 See *infra* notes 98–104 and accompanying text.

59 See *Equal Employment Opportunity Comm’n v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

60 See *id.*

61 See *id.*

62 *Small*, 544 U.S. at 389 (“That presumption would apply ... were we to consider whether this statute prohibits unlawful gun possession abroad as well as domestically.”).

63 *Id.*

64 *Id.* at 390–91.

domestically oriented statutes" is broader than the doctrine against extra-territoriality because it does not matter if the conduct occurs overseas or in the United States.⁶⁵ For example, the *Small* decision restricted the statute from reaching felonious possession of a firearm occurring in Pennsylvania under its new rule.⁶⁶ Unfortunately, the Court has offered few clues on how to determine whether a statute is "domestically oriented" or how to apply the rule; the issue is ambiguous throughout the Court's jurisprudence.⁶⁷ The implications of the Court's new rule are more thoroughly discussed below in Part III.

Second, the majority asserts that there would be "anomalies" unless the statute excludes foreign convictions.⁶⁸ If foreign convictions counted, foreign and domestic offenders would be treated differently under certain exceptions—the statute would treat domestic offenders more leniently than foreign offenders in some situations,⁶⁹ but in other situations, such as a misdemeanor domestic violence offense, the domestic offender would receive harsher treatment.⁷⁰ Justice Breyer's rationale suggests that had Congress thought about foreign judgments, it would have provided across-the-board exceptions and not exceptions limited to merely domestic convictions.⁷¹ The Court, in invoking the canon against absurdities, reasons that such distinctions would be "senseless."⁷²

The canon against absurdities is a rule of statutory construction whereby a court can reject the plain language of a statute to avoid "patently absurd consequences."⁷³ This canon is not to be liberally applied; its application demands extraordinary circumstances.⁷⁴ The issue here is whether differ-

65 See generally *Small*, 544 U.S. at 399 (Thomas, J., dissenting).

66 See *id.* at 1754, 1758.

67 See, e.g., *Pasquantino*, 544 U.S. 349, 371–72. ("[T]he wire fraud statute punishes frauds executed 'in interstate or foreign commerce,' so this is surely not a statute in which Congress had only 'domestic concerns in mind.'") (internal citations omitted). However, this reasoning is difficult to reconcile with the plain language of 18 U.S.C. § 922(g)(9) which makes it unlawful for certain persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Like the wire fraud statute, it seems Congress did not have only "domestic concerns in mind" in enacting 18 U.S.C. § 922(g).

68 *Small*, 544 U.S. at 391.

69 *Id.* at 403 (Thomas, J., dissenting) ("A domestic antitrust or business regulatory offender could possess a gun, while a similar foreign offender could not; the perpetrator of a state misdemeanor punishable by two years or less in prison could possess a gun, while an analogous foreign offender could not.").

70 *Id.* at 403–04 (Thomas, J., dissenting).

71 *Id.* at 391.

72 *Id.*

73 *United States v. Brown*, 333 U.S. 18, 27 (1948).

74 "This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of

ing levels of treatment for foreign and domestic offenders is reasonably justified—if extremely unreasonable, the plain text arguably leads to absurd results and the statute should not be read literally.⁷⁵ Thomas, in dissent, argues against application of the canon against absurdities:

[T]he majority's interpretation permits those convicted overseas of murder, rape, assault, kidnapping, terrorism, and other dangerous crimes to possess firearms freely in the United States. Meanwhile, a person convicted domestically of tampering with a vehicle identification number, 18 U.S.C. § 511(a)(1), is barred from possessing firearms. The majority's concern with anomalies provides no principled basis for choosing its interpretation of the statute over mine.⁷⁶

A literal interpretation of the statutory text does not lead to the patently absurd consequences required for application of the exception.⁷⁷ Congress might have carved out certain exceptions to favor domestic offenders over foreign offenders for practical reasons. Thomas provides an example: “[I]t is not senseless to bar a Canadian antitrust offender from possessing a gun in this country, while exempting a domestic antitrust offender from the ban. Congress might have decided to proceed incrementally and exempt only antitrust offenses with which it was familiar, namely, domestic ones.”⁷⁸ If there is some reasonable justification for a literal reading, it seems prudent to bar application of the canon against absurdities and adhere to the text of the statute as enacted by Congress.

3. *Congressional Purpose.*—The purpose of the GCA is to keep guns out of the hands of individuals who have proved themselves dangerous to society.⁷⁹ The difficulty is identifying who is dangerous. To determine whether a person or class of persons poses danger, one might reasonably inquire about criminal history, felonious or otherwise.

A person with a history of misdemeanor violence convictions might be more likely to commit a gun crime than many felons. Of particular concern are misdemeanor crimes involving family violence. Not every convicted

applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone.” *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring).

75 See, e.g., Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289 (1989) (“[L]iteral application of a directive might be senseless or contrary to its obvious purpose. For example, virtually no one doubts the correctness of the ancient decision that a statute prohibiting ‘letting blood in the streets’ did not ban emergency surgery.”) (citing *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part)).

76 *Small*, 544 U.S. at 405 (Thomas, J., dissenting) (internal citations omitted).

77 *Id.* at 403–04.

78 See *id.* at 404.

79 See *supra* text accompanying notes 6–7.

felon will be prone to committing an act of physical violence, and the GCA has carved out exceptions so that certain categories of felons can lawfully own a gun.⁸⁰

Even within the category of violent offenders, there is hope that those convicted of serious crimes will no longer face temptation to commit more crimes in the future. One goal of the criminal justice system is to rehabilitate those who break the law. People can reform, and a reformed man should have the right to own a gun for self-defense. It follows that prohibition on gun ownership, unfortunately, sometimes keeps guns out of the hands of those who are *not* a danger to society. Many gun rights supporters do not oppose the felon-in-possession statute despite these minor drawbacks.⁸¹

But sometimes convicted felons do not reform. Punishment for the violent crime alone may not be enough to deter further criminal conduct by the felon. A criminal knows he will be serving a long sentence if convicted of murder or some other serious crime. The problem is the criminal typically does not believe he will be caught—else he would take additional measures to cover up evidence of the act or abandon the act altogether. It follows that § 922(g)(1) is a necessary prophylactic to deter violent crime when the threat of punishment for the violent crime offers minimal deterrence.

A foreign court may provide lesser, or sometimes greater, protection for individual rights than a domestic court.⁸² Acts criminalized under a foreign legal system might be legal, or perhaps even encouraged, here.⁸³ A particular criminal act may carry a more severe punishment abroad than here. For example, Japan is known for its strict gun laws.⁸⁴ For these reasons, Breyer concludes that a foreign conviction “somewhat less reliably identifies dangerous individuals” than a domestic conviction.⁸⁵

Despite the differences, foreign convictions arguably indicate dangerousness just as reliably as domestic convictions.⁸⁶ A resident or traveler to a foreign nation ought to obey the laws of that nation. If foreign convictions

⁸⁰ See *supra* note 69.

⁸¹ See <http://www.nraila.org/Issues/FAQs/Default.aspx?Section=21> (“Today, NRA continues to lead the call for expansion of ‘Project Exile,’ a federal program that throws the book at felons who illegally possess firearms.”).

⁸² See *Small*, 544 U.S. at 389–90.

⁸³ *Id.* (citing, for example, Art. 153 of the Criminal Code of the Russian Soviet Federated Socialist Republic, in *Soviet Criminal Law and Procedure* 171 which criminalizes “Private Entrepreneurial Activity.”).

⁸⁴ See <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=78> (“In Japan, rifles and handguns are prohibited; shotguns are very strictly regulated. Japan’s Olympic shooters have had to practice out of the country because of their country’s gun laws.”)

⁸⁵ *Small*, 544 U.S. at 390.

⁸⁶ See *id.* at 402 (Thomas, J., dissenting) (claiming that the majority “ignores countless other foreign convictions punishable by more than a year that serve as excellent proxies for dangerousness and culpability”).

counted under 18 U.S.C. § 922, it is inevitable and unfortunate that a person convicted overseas would be prohibited from owning a gun here despite posing no danger to society. The GCA is not a perfect solution to gun control, but the reality is that there is no way to predict the future to find out if someone will commit a violent crime. It is reasonable that Congress, in its choice of expansive language not found in many other sections of the GCA,⁸⁷ recognized that foreign convictions can provide a reliable means of measuring dangerous to society.

4. *Legislative History.*—In support of the ordinary assumption about the reach of domestically oriented statutes,⁸⁸ the majority relies on legislative silence as to whether the statute applies to foreign convictions.⁸⁹ First, Breyer reasons that Congress probably did not consider foreign convictions because it is a rare occurrence that a felon will be prosecuted under § 922(g)(1) on the basis of a foreign conviction.⁹⁰ The strength of this argument is significantly weakened by an October 2004 report from the Americans for Gun Safety Foundation which found that the government simply chooses not to prosecute most gun crimes.⁹¹ Two of the twenty-two major gun crimes made up eighty-seven percent of federal prosecutions in 2003.⁹² It is also possible that federal prosecutors focused their efforts on possession charges against felons convicted in the United States instead of bringing charges against those with prior overseas convictions. The then-existing circuit split might have discouraged prosecutors from bringing charges against felons like Small. The point is that the government *should* be prosecuting many of those gun crimes. Second, Breyer fails to mention that the GCA was passed in a hurry in response to several high-profile assassinations which arguably explains the sparse legislative history.⁹³

Thomas argues that the Court incorrectly relies on legislative silence because Congress in fact was not silent.⁹⁴ The Senate bill included narrow language such as “State,” “Federal,” and “felony” before being amended

87 See, e.g., *supra* note 54.

88 See *supra* text accompanying notes 55–67.

89 *Small*, 544 U.S. at 394.

90 *Id.*

91 AMERICANS FOR GUN SAFETY FOUND., THE ENFORCEMENT GAP: FEDERAL STRATEGY NEGLECTS SOURCES OF CRIME GUNS 2 (2004), available at <http://w3.agsfoundation.com/media/AGS-enf.pdf>.

92 See *supra* text accompanying note 5.

93 Christine A. Vogeley, *The Fundamental (Un)Fairness of Foreign Convictions as Predicate Felonies*, 38 U.C. DAVIS L. REV. 1317, 1321 (2005) (suggesting that the sparse legislative history can be attributed to “Congress hurriedly pass[ing] the Safe Streets Act” in response to the assassinations of President John F. Kennedy, Dr. Martin Luther King, Jr., and Senator Robert Kennedy).

94 *Small*, 544 U.S. at 406–07 (Thomas, J., dissenting).

to include the broad language "in any court."⁹⁵ Was Congress truly silent? Sometimes actions speak louder than words. The change from narrow to broad language supports the contention that Congress wanted to give the statute an expansive meaning, or else Congress would have preserved the original language or used alternate wording such as "convicted in any Federal or State court of a crime punishable by a term of imprisonment exceeding one year."⁹⁶

II. IMPLICATIONS OF THE DECISION

Prosecutions under § 922(g)(1) for foreign convictions do not occur frequently: there were only five courts of appeals and three district court opinions prior to the *Small* decision.⁹⁷ Perhaps infrequent prosecution can be explained by the government's reluctance to prosecute rather than an insignificant number of foreign convicted gun owners. Despite the rarity of prosecution, the decision has far reaching effects because of the creation of an unprecedented rule and the frequency with which similar "in any court" language appears in other recently-enacted statutes.

A. Assumption about the Reach of Domestically Oriented Statutes

The majority creates an assumption about the reach of domestically oriented statutes.⁹⁸ A statute "applies domestically, not extraterritorially" unless "statutory language, context, history, or purpose" suggest otherwise.⁹⁹ Breyer justifies the new rule by analogizing the rule to the doctrine against extraterritoriality which attempts to restrict federal statutes "from reaching conduct beyond U.S. borders" when Congress is silent.¹⁰⁰

The key to understanding the difference between the two doctrines is figuring out where the conduct in controversy occurred. In *Small*, the

95 *Id.* at 397-98, 406 (Thomas, J., dissenting); see also *supra* text accompanying notes 50-53.

96 *Id.* at 406 (Thomas, J., dissenting).

97 Brief, *supra* note 19, at 11.

98 See *supra* text accompanying notes 55-67.

99 *Small*, 544 U.S. at 390-91.

100 *Small*, 544 U.S. at 400 (Thomas, J., dissenting). To apply the canon of construction, a court should look at the statutory text to see whether Congress' purpose was to extend coverage of the statute beyond the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). The doctrine against extraterritorial application of federal statutes would have been applicable had the statute attempted to criminalize gun possession abroad. *Small*, 544 U.S. at 399 (Thomas, J., dissenting). Neither does 18 U.S.C. § 922(g)(1) attempt to enforce foreign law. If foreign convictions counted, prosecution under § 922(g)(1) would still punish domestic conduct, the unlawful possession of a firearm. The statute would take foreign judgments as it finds them.

alleged criminal conduct, unlawful possession of a firearm by a felon, happened in Pennsylvania.¹⁰¹ On the other hand, the government was *not* trying to bring charges against Small for smuggling firearms, conduct that took place in Japan.¹⁰²

If the possession had occurred outside the United States in the face of Congressional silence then it is likely that the doctrine against extraterritoriality is applicable to restrict the reach of the statute. For the majority's new rule, it does not matter if the unlawful conduct occurs within the United States or if it happens on foreign soil.¹⁰³ Breyer draws a bright line between "domestically oriented statutes" and those that are not and hastily lumps 18 U.S.C. § 922(g)(1) into the "domestically oriented" category.¹⁰⁴

The obvious implication of the new rule is that Congress must clearly express its intent to encompass foreign matters if it wants a statute to refer to international law. Expansive language on its own, such as "in any court," is insufficient after the *Small* holding. Breyer hints that foreign convictions are relevant for statutes dealing with terrorism or immigration.¹⁰⁵ However, a statute may blur the line between purely domestic and international in scope. The majority's bright line rule is of little practical use unless courts know how to apply it. The problem is that the majority provides few guidelines regarding what is sufficient to keep a statute out of the "domestically oriented" category.¹⁰⁶ In the absence of further guidance from the Court, the meaning of statutes with similar wording remains unclear.

B. The Patriot Act and the Immigration and Nationality Act

This statute, 18 U.S.C. § 922, is not the only one with "convicted in any court" language. The *Small* decision may affect certain sections of the Patriot Act¹⁰⁷ and the Immigration and Nationality Act ("INA").¹⁰⁸

The *Small* decision affects immigration law, as the INA definition of "aggravated felony" includes a § 922(g)(1) offense.¹⁰⁹ Aggravated felonies provide one criminal ground for the deportation of aliens.¹¹⁰ Many types of crimes are aggravated felonies under the INA, and aliens can be banished for even trivial crimes:

101 *Small*, 544 U.S. at 387.

102 *See id.*

103 *Id.* at 389–90.

104 *See supra* note 67.

105 *Small*, 544 U.S. at 391.

106 *Id.* at 399–401.

107 *See* Brief, *supra* note 19, at 12 & n.7.

108 8 U.S.C. § 1101(a)(43)(E)(ii) (2000); 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

109 8 U.S.C. § 1101(a)(43)(E)(ii).

110 8 U.S.C. § 1227(a)(2)(A)(iii).

In 1989 [Xuan Wilson] was convicted of writing a forged check for \$19.83. Because of this minor infraction, Ms. Wilson will be deported to a country she has not seen for almost three decades and will be permanently barred from returning to the United States. This situation is only one example of the many severe consequences of current U.S. immigration law. Under current law, a lawful permanent resident (LPR) of the United States can be banished from the country for an offense as minor as writing a bad check, shop-lifting, or misdemeanor battery.¹¹¹

If "writing a bad check, shop-lifting, or misdemeanor battery," assuming the offense occurred in the United States, are grounds for banishment under the INA, it is not unreasonable to deport an alien for a foreign conviction of serious magnitude.

The Biological Weapons Statute as amended by the Patriot Act prohibits the possession of biological weapons by a "restricted person" who "has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year."¹¹² Another section of the Patriot Act, the explosives statute, makes it unlawful to knowingly distribute explosives to anyone who "has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year"¹¹³ The provision similarly prohibits shipping, transporting, and possessing explosives by this restricted class.¹¹⁴

It seems intuitive that Congress intended the Biological Weapons Statute and the explosives statute to count foreign convictions. The purpose of the Patriot Act is to combat terrorism, and foreign convictions are arguably relevant to the war on terror. These statutes might pass muster under the assumption about the reach of domestically oriented statutes. The *Small* majority hints that statutes dealing with immigration and terrorism are less likely to be "domestically oriented" than statutes involving other subject matter.¹¹⁵ The Court, however, has previously stated that the doctrine against extraterritoriality, which is similar to the *Small* rule, "has special force" when a statute "involve[s] foreign and military affairs."¹¹⁶ It remains to be seen whether Congress will eliminate all doubt as to the scope of these statutes by amending them to explicitly provide for extraterritorial application.

111 Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 293-94 (2003).

112 18 U.S.C. § 175b(d)(2)(B) (2000), added by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, Title VIII, § 817(2), 115 Stat. 386 (Oct. 26, 2001).

113 18 U.S.C. § 842(d)(2).

114 18 U.S.C. § 842(i)(1).

115 *Small v. United States*, 544 U.S. 385, 390 (2005).

116 *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

III. PROPOSED SOLUTIONS

Balancing the constitutional right to bear arms against public safety is not an easy task. On one hand, citizens ought to be able to defend themselves, and guns are necessary for self-defense. There exists a concern that individual rights are gradually being chipped away each time a new piece of gun regulation is passed.

On the other hand, unrestricted gun ownership is no longer practical, and Congress, in enacting the GCA, recognized the urgency of regulating gun ownership to protect the public. In 1968, the concern was with high-profile assassinations.¹¹⁷ In 2005, society continues to struggle with gun violence. School shootings, domestic and international terrorism, and everyday incidents of domestic violence serve as reminders that guns should be kept away from those unable to use them responsibly.

Even the National Rifle Association does not oppose the felon-in-possession statute.¹¹⁸ It makes sense that those convicted of serious crimes, especially violent acts such as murder, have proven unable to own a gun without posing a threat to society. The obstacle to giving the felon-in-possession statute a literal interpretation is the Court's reluctance to accept that American courts are well-prepared to recognize the decisions of foreign courts.

Globalization is bringing the world closer together. As a result, the concern for international law is more prevalent now than ever before. Globalization has led to many economic benefits such as "increased trade, increased flows of information and capital, increased foreign investment, and increased mobility of labor and the means of production."¹¹⁹ With the good comes the bad: "Globalization is bringing ideas, cultures and lifestyles into contact—and sometimes conflict—with one another in new and unusual ways."¹²⁰ American courts should embrace globalization by recognizing foreign convictions; an interpretation of the felon-in-possession statute that considers foreign convictions would help to keep firearms out of the hands of people likely to commit gun crime.

Perhaps the most persuasive argument against a literal reading of § 922(g)(1) is that Congress can amend the statute if it wants to count foreign convictions as predicate offenses for felon-in-possession prosecution. That is, "convicted in any court" could be rephrased to give extraterritorial effect, and there would be no dispute as to Congressional intent. The justification for demanding Congressional action is that the judiciary should

¹¹⁷ See Vogeley, *supra* note 93, at 1321.

¹¹⁸ http://en.wikipedia.org/wiki/Gun_Control_Act.

¹¹⁹ <http://www.bis.doc.gov/News/Archive2001/GlobalizationNExportControlsKJSpeech11210.htm>.

¹²⁰ Gert Weisskirchen & George Voinovich, *Halting the New Hatred*, WASH. POST, April 28, 2004, at A21.

avoid legislating from the bench. However, there are mechanisms already in place to support the feasibility of using foreign convictions as predicate offenses, such as requesting relief from the Secretary of the Treasury.

A. Discretionary Relief

Congress provided a method of obtaining relief from the disabilities imposed by § 922(g)(1). Prior to 1992, relief was available to domestic felons and presumably also to those convicted abroad.¹²¹ A person convicted of a serious crime in a foreign court could clear his or her status before attempting to purchase a firearm in the U.S.¹²² Unfortunately, Congress has denied funding for this purpose since 1992.¹²³

Eighteen U.S.C. § 925(c) provides that one can request relief from the Secretary of the Treasury. The Secretary may restore gun privileges to an applicant if "the applicant will not be likely to act in a manner dangerous to public safety" and "the granting of the relief would not be contrary to the public interest."¹²⁴ Judicial review is available if the applicant feels the Secretary wrongly denied relief.¹²⁵

In the event Congress lifts its bar on funding, § 925(c) would alleviate many of the problems regarding counting foreign convictions that concerned the *Small* majority.¹²⁶ Although relief does not turn on the validity of the foreign conviction, the Secretary is to consider "the circumstances regarding the conviction and the applicant's record and reputation."¹²⁷ The grounds for providing relief seem more persuasive when a foreign conviction is highly offensive to domestic notions of fairness as illustrated by the following:

A licensed firearms dealer, Thomas Bean, drove from the gun show he was working in Texas across the border to Mexico for dinner. He inadvertently left a box of ammunition in his car, and when the Mexican border agents discovered it, they immediately arrested him. After Bean signed a confession written in Spanish, a language he did not understand, without assis-

121 A gun dealer was convicted in a Mexican court for importing ammunition into Mexico. He applied for relief, but his application was returned unprocessed because Congress had cut off funding for this purpose. Presumably there would have been an investigation in the absence of a congressional bar on funding for relief from firearm disabilities. *United States v. Bean*, 537 U.S. 71 (2002).

122 See generally 18 U.S.C. § 925(c) (2000).

123 *Bean*, 537 U.S. at 74.

124 18 U.S.C. § 925(c).

125 See *Bradley v. Bureau of Alcohol, Tobacco and Firearms*, 736 F.2d 1238 (8th Cir. 1984); *Kitchens v. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 535 F.2d 1197 (9th Cir. 1976); *United States v. Winson*, 793 F.2d 754, 758 (6th Cir. 1986).

126 See *supra* text accompanying notes 68-72.

127 § 925(c).

tance of counsel, a Mexican court sentenced him to five years in prison. Public outcry over the severity of Bean's punishment spurred the Mexican government to quickly reclassify the offense as a misdemeanor. Due to the conviction, however, Bean could no longer continue his livelihood as a gun dealer because of his status as a felon under the Safe Streets Act.¹²⁸

Despite the persuasive facts surrounding the *Bean* case, an applicant's subjective perception of how he was treated by a foreign court might prove unconvincing to the Secretary unless the applicant has some physical evidence to back up his claim.

One disadvantage of discretionary relief is that it can be difficult for the applicant to show "the circumstances regarding the conviction" given that he likely will not have access to the foreign court documents and, even if he gets the documents, they probably will be in a foreign language. The documents might leave off evidence the applicant needs to argue his position. It seems unlikely the Secretary will be persuaded to grant relief without evidence from official court documents. For these reasons it seems unlikely that the ability to request relief from the Secretary is sufficient in itself to justify recognition of foreign decisions, but its availability might be of use to an applicant convicted in a court of similar jurisprudence as our own, such as an English court.

B. Judicial Non-Recognition

A reasonable judicial solution might be a case-by-case evaluation of foreign judgments. A domestic court could recognize some decisions but refuse to recognize other decisions. A court could conceivably examine the circumstances surrounding a foreign conviction to determine whether it should count for purposes of § 922(g)(1). The Restatement (Third) of Foreign Relations Law of the United States ("Restatement") provides guidance with two grounds that mandate non-recognition and six discretionary grounds that provide for selective non-recognition of foreign decisions.¹²⁹ The consequence of non-recognition is typically making the foreign judgment inadmissible as evidence in a domestic court.¹³⁰

The Restatement approach provides that a domestic court *may not* recognize a foreign judgment when: (1) "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law,"¹³¹ or (2) the foreign court "did not have

128 See Volegei, *supra* note 93, at 1318–19 (2005) (citing *Bean v. United States*, 89 F. Supp. 2d 828, 829 (E.D. Tex. 2000)).

129 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

130 *Id.* at § 482, cmt. i.

131 *Id.* at § 482. Christine Aubin proposes a case-by-case analysis under a two-prong test: "Would the offense be considered a felony under the laws of the United States?" and "Does

jurisdiction over the defendant.”¹³² In addition, the Restatement gives domestic courts the *discretion* to refuse recognition of foreign decisions. Relevant factors include a lack of subject-matter jurisdiction, insufficiency of notice to the defendant, fraud, and public policy considerations.¹³³

The advantage of the Restatement approach is that it furthers the Congressional purpose of keeping guns out of the hands of those who cannot be trusted¹³⁴ while simultaneously providing procedural safeguards against counting offensive foreign judgments. It allows dubious decisions to be ignored for purposes of § 922(g)(1) and related provisions. In sum, adoption of the Restatement could offer a reasonably fair process for reformed felons.

One disadvantage of selective recognition of foreign judgments is that it requires a case-by-case analysis, which is more difficult than taking foreign judgments “as is.” Evidence contained in foreign court documents could be highly relevant to the analysis. The foreign court might refuse to comply with a request for production of the documents. If the documents are handed over, the text may be in a foreign language. Many American judges might be ill-prepared to tackle such rulings. These factors burden a court attempting to apply the Restatement approach. A second disadvantage is that case-by-case analysis goes against the plain text of the statute.¹³⁵ Congress supplied exceptions to § 922(g)(1),¹³⁶ yet nowhere is it mentioned that some foreign judgments should count, but others should not.

Although the Restatement is not binding authority, it is a highly persuasive approach of how courts ought to treat international law. Overall, the Restatement approach provides effective safeguards for those convicted in foreign courts at the cost of burdening both the judiciary and the felon.

IV. CONCLUSION

International law raises challenging issues: First, should the government punish a criminal based on a foreign judgment? Second, should the degree to which the foreign judicial system differs from ours matter? There are no easy solutions. Balancing all the competing interests is no simple task.

Concededly, many foreign judicial systems do not protect individual rights in the same manner as ours. Foreign courts might not provide for

this nation/country adhere to similar due process standards and requirements as the United States?” Christine Aubin, *Case Comment: United States v. Gayle*, 48 N.Y.L. SCH. L. REV. 847, 854–57 (2004).

¹³² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

¹³³ *Id.*

¹³⁴ See *Lewis*, 445 U.S. at 63.

¹³⁵ See *supra* text accompanying notes 39–44.

¹³⁶ *Small v. United States*, 544 U.S. 385, 403 (2005) (Thomas, J., dissenting).

due process, the right to counsel, or other notable principles of American jurisprudence:

The new Palestinian judicial system also suffers from due process and other basic constitutional protection problems. For example, in Gaza and the West Bank, many individuals are incarcerated for a significant period of time without receiving legal counsel. Moreover, oftentimes individuals accused are not informed of their right to counsel. Police officers involved may delay advising the accused of their rights until after the prosecutor interrogates the accused and takes a statement. Considering these violations of basic due process, it can hardly be said that persons charged under Palestinian law are tried fairly according to U.S. standards of justice.¹³⁷

Although foreign criminal justice systems may provide protections that fall short of the procedural safeguards guaranteed by the U.S. Constitution, we must not let pride in our judicial system rise to the level of arrogance. First, on average, it cannot be said that foreign courts offend the traditional notions of fairness—much of American law originated from the common law of England.¹³⁸ Second, the *Winson* court could “perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States.”¹³⁹

For those isolated convictions where there was a substantial deprivation of basic rights, there are at least two readily-available solutions: (1) relief from the Secretary of the Treasury should Congress appropriate funds and (2) judicial non-recognition under the Restatement approach. Collectively these two solutions are sufficient to protect individual rights if foreign judgments are honored while simultaneously guarding society against danger.

137 Aron J. Estaver, *Dangerous Criminals or Dangerous Courts: Foreign Felonies as Predicate Offenses Under Section 922(g)(1) of the Gun Control Act of 1968*, 38 VAND. J. TRANSNAT'L L. 215, 240 (2005).

138 *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989) (“Atkins suffered the misfortune of violating foreign law in England, the country which provides the origin or antecedent of the jurisdictional system employed in the United States of America. We here deal with a system of common law and statutes refining it which obtains in England and America alike.”).

139 *United States v. Winson*, 793 F.2d 754, 758 (6th Cir. 1986).

